No. 20106

In the United States Court of Appeals for the Ninth Circuit

GREAT WESTERN BROADCASTING CORPORATION, d/b/a KXTV, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON SUPPLEMENTAL PETITION TO REVIEW A SUPPLEMENTAL DECISION OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon petition of the Great Western Broadcasting Corporation, d/b/a KXTV, hereafter called KXTV, to review a supplemental decision of the National Labor Relations Board issued December 16, 1964, dismissing an unfair labor practice complaint (R. 19–27)[1] which had issued upon charges filed by KXTV. The Board's original decision

[1] The printed record in No. 17,698, the prior appeal in this matter, has, by stipulation of the parties, been made a part of the record here. References to that record are designated "R." The Board's Supplemental Decision, entered after this Court's remand, is reprinted in Appendix B, *infra*, pp. 25–34.

and order (R. 65–76) are reported at 134 NLRB 1617. This Court's opinion, setting aside that order and remanding the case to the Board, is reported at 310 F. 2d 591. The Board's supplemental decision on remand (*infra*, pp. 25–34), is reported at 150 NLRB No. 46. This Court has jurisdiction of the proceeding under Section 10(f) of the National Labor Relations Act, the alleged unfair labor practices having occurred within this judicial circuit.[2]

COUNTERSTATEMENT OF THE CASE

I. The earlier Board and Court decisions

The complaint alleged that the Unions,[3] in furtherance of a strike against KXTV, engaged in conduct which was violative of Section 8(b)(4)(ii)(B) of the Act (*infra*, p. 5). As detailed more fully in the Court's first decision (310 F. 2d at 593–594), the Unions: (1) made oral appeals to advertisers who used KXTV to discontinue their patronage of the station; (2) sent letters to advertisers advising them of the background of the strike and warning them of adverse economic reaction if they continued to use the station; (3) printed and distributed 4,000 handbills listing KXTV as "unfair" and naming Greer, Rainbo, Shell, and Burgermeister [4] as advertisers who continued to utilize KXTV, which handbills were dis-

[2] The pertinent statutory provisions are reprinted in Appendix A, *infra*, pp. 23–24.

[3] American Federation of Television and Radio Artists, San Francisco Local and The National Association of Broadcast Employees and Technicians, Local 55.

[4] An automobile dealer, a baking company, a gasoline service chain, and a beer manufacturer and distributor.

tributed in front of KXTV, at the Sacramento Labor Temple, and at various grocery stores which handled Rainbo bread and Burgermeister beer; (4) sent letters to the San Francisco Labor Council asking it and the members of its affiliated unions to turn in their Shell credit cards, and listing 14 companies who were then advertising on KXTV and soliciting "any aid" the Council and the members of its affiliates "can give"; and (5) threatened two advertisers with being named in a new leaflet unless they discontinued using KXTV. The Board held that the Unions' conduct was protected by the "publicity proviso" to Section 8(b)(4) (*infra*, p. 5), which removes from the ban of that section "publicity, other than picketing, for the purpose of truthfully advising the public including consumers and members of labor organizations, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer. * * *" The Board accordingly dismissed the complaint. (R. 65–76.)

On KXTV's petition to review, this Court reversed the Board, holding that the television advertising services of KXTV were not "a product or products" within the meaning of the proviso to Section 8(b)(4). Although recognizing that those terms were capable of being construed to encompass the rendition of services, the Court concluded that the context in which they appeared indicated that Congress intended to give them a more restrictive meaning. That is, the Court was of the view that, in the proviso, Congress was

referring only to the manufacturer or processor of a tangible article. (310 F. 2d at 595–598.)

However, the Unions, which had been permitted to intervene, argued that, in any event, their conduct did not constitute threats, coercion, or restraint within the meaning of Section 8(b)(4)(ii)(B) and that such conduct was indeed protected by the First Amendment. The Court remanded the case to the Board to consider these questions. (310 F. 2d at 600.)

II. The supplemental Board decision

The Board, evaluating each of the actions engaged in by the Unions, found that all of the conduct, other than the mere request that neutrals not advertise on KXTV, constituted threats, coercion, or restraint within the meaning of Section 8(b)(4)(ii)(B) of the Act (*infra,* p. 5). However, the Board again dismissed the complaint on the ground that the Unions' conduct was protected under the publicity proviso to Section 8(b)(4).[5] The Board concluded that, in *N.L.R.B.* v. *Servette, Inc.,* 377 U.S. 46, 54–57 (discussed more fully, *infra,* pp. 8–10), which was decided after the remand here, the Supreme Court had rejected this Court's narrow interpretation, and had confirmed the Board's broader reading, of the proviso.[6] (*Infra,* pp. 31–33.)

[5] In view of its dismissal of the complaint, the Board found it unnecessary to, and thus did not reach, the question whether Section 8(b)(4)(ii)(B) would be constitutional if it were construed to cover the conduct here (*infra,* p. 33).

[6] The Supreme Court reversed this Court's decision in *Servette, Inc.* v. *N.L.R.B.*, 310 F. 2d 659, 667. There, this Court, applying its holding in the instant case, had held that the proviso did not protect handbilling of secondary employers in furtherance of a dispute with a distributor.

ARGUMENT

The Unions' activity was protected by the publicity proviso to Section 8(b)(4)

A. The Supreme Court decisions in *Servette* and *Fruit and Vegetable Packers*

Section 8(b)(4)(ii)(B) of the Act makes it an unfair labor practice for a union—

> to threaten, coerce, or restrain any person * * *

where an object therof is—

> forcing or requiring any person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. * * *

A proviso to Section 8(b)(4) adds—

> That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

The Supreme Court, in *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 46, and *N.L.R.B.* v. *Fruit and Vegetable Packers, Local 760,* 377 U.S. 58, laid down the prin-

ciples for applying these provisions. In *Fruit and Vegetable Packers,* the union, in furtherance of a dispute with some fruit packers, picketed retail stores with signs requesting the consuming public not to purchase apples obtained from those packers. The Board, finding that the picketing tended to threaten or restrain the neutral stores, for an object of forcing them to cease doing business with the disfavored packers, held that the picketing violated Section 8(b)(4)(ii)(B) of the Act. The Supreme Court set aside the Board's order.

The Court, being of the view that a ban on all peaceful consumer picketing at secondary sites would raise a serious constitutional question, examined the legislative history of the 1959 amendments to Section 8(b)(4) with great care and concluded that it merely reflected a congressional intention to proscribe such picketing where it was designed "to persuade the customers of the secondary employer to cease trading with him," and not where it was "directed only at the struck product" (377 U.S. at 63). As the Court explained (*id.,* at 63–64):

> In the latter case, the union's appeal to the public is confined to its dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods. On the other hand, a union

> appeal to the public at the secondary site not to trade at all with the secondary employer goes beyond the goods of the primary employer, and seeks the public's assistance in forcing the secondary employer to cooperate with the union in its primary dispute. * * *[7]

Nor, in the Court's view, was a congressional intention to proscribe all consumer picketing at secondary sites shown by the circumstance that the proviso to Section 8(b)(4) privileged "publicity, other than picketing," but made no allowance for picketing confined to the product in dispute. The Court stated (377 U.S. at 70–71):

> The proviso indicates no more than that the Senate conferees' constitutional doubts led Congress to authorize publicity other than picketing which persuades the customers of a second-

[7] The Court added (377 U.S. at 72):

When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employers' purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer. [Footnote omitted.]

> ary employer to stop all trading with him, but not such publicity which has the effect of cutting off his deliveries or inducing his employees to cease work. On the other hand, picketing which persuades the customers of a secondary employer to stop all trading with him was also to be barred.

In *Servette,* the union, in furtherance of its dispute with a wholesale distributor of specialty merchandise, requested the managers of certain food chains to discontinue handling goods supplied by Servette. The managers were warned that handbills asking the public not to buy the items distributed by Servette would be passed out in front of stores which refused to cooperate, and in some cases handbills were in fact passed out. The Supreme Court, reversing this Court's decision (see n. 6, *supra*), sustained the Board's dismissal of the unfair labor practice complaint. The Court held that the requests to the store managers were not barred by subparagraph (i) of Section 8(b)(4), for that provision merely interdicted the inducement of employees to withhold employment services and not the inducement of managerial personnel to make a management decision.[8] 377 U.S. at 49–54. The Court further held that the handbilling, and the threats to handbill, did not constitute threats, coercion, or restraint barred by subparagraph (ii) of

[8] Subparagraph (i) makes it an unfair labor practice for a labor organization "to induce or encourage any individual employed by any person * * * to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services"—for the proscribed secondary object.

Section 8(b)(4), for such activity was protected by the publicity proviso. Rejecting this Court's view that the proviso was inapplicable because the union's dispute was with a wholesaler, and not the manufacturer, the Supreme Court stated (377 U.S. at 55):

> The proviso was the outgrowth of a profound Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded. * * * It would fall far short of achieving this basic purpose if the proviso applied only in situations where the union's labor dispute is with the manufacturer or processor. * * * There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress.

In sum, the Supreme Court decisions in *Fruit and Vegetable Packers* and *Servette* hold that Congress moved with extreme caution and drew careful lines in interdicting union appeals to the consuming public to aid it in its dispute with a primary employer. That is, even though such appeals occur at a secondary site and thus may tend, in a very real sense, to exert economic pressure on neutral employers to cease doing business with the primary employer, not all such appeals fall within the ban of Section 8(b)(4)(ii)(B). First, a distinction must be drawn between appeals to consumers which merely call for a boycott of the primary employer's goods, and those which call for a more widespread boycott. The former type of boycott

appeals, whether made by picketing or by other means, do not constitute a threat, coercion, or restraint within the meaning of subparagraph (ii) of Section 8(b)(4). Second, with respect to consumer boycott appeals which are not limited to the primary employer's goods, a distinction must be drawn between appeals made by means of picketing and those which are made by other means, such as oral requests and handbilling. Such "broad" appeals constitute a threat, coercion, or restraint within the meaning of subparagraph (ii) of Section 8(b)(4), and, if made by picketing, the picketing would be unlawful (assuming the secondary object proscribed in (B) is found); however, if "publicity" other than picketing be used, the activity is saved from the ban of Section 8(b)(4)(ii)(B) by the publicity proviso to that section (absent an interference with deliveries).

B. Under the foregoing principles, the Unions' activity here, although constituting threats, coercion, or restraint within the meaning of Section 8(b)(4)(ii), was saved by the publicity proviso

1. With one exception,[9] the conduct engaged in by the Unions falls into three general categories: (a) calls upon advertisers, requesting that they discontinue advertising on KXTV and warning, that if they did not, appeals would be made to consumers not to

[9] The conduct listed in item (1) in the Court's prior opinion (310 F. 2d at 593) consisted of requests that advertisers cease doing business with KXTV. Since the requests were unaccompanied by threats of subsequent economic action, the Board properly found that they were not within the reach of Section 8(b)(4)(B). See *N.L.R.B.* v. *Servette*, 377 U.S. at 54, and n. 12. Petitioner, although disagreeing with this conclusion, does not contest it now (Br. 7, n. 11).

buy their products (items 2, 3, 7, and 8 in the Court's prior opinion, 310 F. 2d at 593–594); (b) letters to the Labor Council requesting it and its members not to patronize the "non-cooperative" advertisers, and to turn in their credit cards for one such advertiser (items 5 and 6); (c) distribution of handbills listing KXTV and its advertisers and requesting the public not to buy the advertisers' products (item 4). The Board found that this conduct was "part of a campaign calculated to bring economic pressure upon the producers and distributors of products advertised on KXTV for the purpose of forcing the producers to cease advertising on KXTV" (*infra,* p. 28). That is, the advertisers (who were neutral secondary employers) were threatened with a loss of consumer patronage if they did not discontinue advertising on KXTV.

Nor was the appeal limited to a boycott of "the primary employer's goods," as in *Fruit & Vegetable Packers, supra.* As the Board stated (*infra,* p. 31), whether those goods "be viewed as the physical product advertised over the facilities of KXTV, or as merely the advertising component added to the product by KXTV's efforts," it is clear that the Union's appeals and related conduct were not so limited. Obviously, their activities could not, and were not, confined to a boycott of only the advertising component. Moreover, the Unions did not confine their appeal to the particular products advertised on KXTV, but rather, as the Board found, sought "the institution of a consumer boycott of all products distributed by the

companies it listed as advertising on KXTV" (*infra,* p. 30).[10]

Accordingly, the Board properly concluded that the conduct in the three categories described above constituted threats, coercion, or restraint for a secondary object, and hence would have violated Section 8(b)(4)(ii)(B) but for the publicity proviso, which we now discuss.

2. Respecting the proviso to Section 8(b)(4) (*supra,* p. 5), the calls, letters and handbills described above were "publicity, other than picketing"; and they were made or circulated "for the purpose of truthfully advising the public, including consumers and members of a labor organization," of the Unions' dispute with KXTV and of enlisting their aid. The proviso, however, further speaks of advising the public, "that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer"; and the question is whether a television station, like KXTV, in performing an advertising service, can be deemed to be the "producer" of a "product or products."

[10] Thus, the letter sent to all advertisers warned that as a result of the Union's coming publicity campaign there would be resentment against "any product *or sponsor*" who takes sides by advertising on KXTV (R. 98, emphasis supplied). The handbills distributed to the public did not specify which products were advertised on KXTV, but merely listed companies who were continuing to advertise and thereby made it appear that a boycott of the total business of these companies was sought (R. 100–101). And, the request to the San Francisco Labor Council that it and the members of its affiliated unions return the credit cards of Shell was not limited to the particular Shell products advertised on KXTV.

In its first decision, the Board, following its ruling in *Lohman Sales Co.,* 132 NLRB 901, 906–908, that the proviso encompassed anyone who enhanced the economic value of the product ultimately sold or consumed, held that KXTV was the "producer" of a "product or products."[11] But, this Court rejected the Board's holding. Although it recognized that the terms "product" and "produced" were susceptible of the interpretation given them by the Board (see 310 F. 2d at 595, 597), it concluded that the context in which the words appeared made it clear that Congress meant to encompass only the manufacturer or processor of a tangible product.[12]

We submit that the Supreme Court decisions in *Fruit & Vegetable Packers* and *Servette* (*supra,* pp. 5–10) have undermined the premise for this Court's

[11] In *Lohman*, as in *Servette*, *supra*, the union's primary dispute was with the distributor of physical products. However, the principle enunciated there was broad enough to encompass one who merely performed services, and in *Middle South Broadcasting Co.*, 133 NLRB 1698, 1704–1706, the Board had specifically applied *Lohman* to a situation where, as here, the primary dispute was with a radio station.

[12] Thus, the Court pointed out that the proviso speaks of "product or products" that are "produced" by the primary employer and "distributed by another employer"; advertising was incapable of being "distributed" particularly where the subject being advertised was not a physical product but a service itself (310 F. 2d at 597–598). And, the Court noted that Congress, in subparagraph (B) of Section 8(b)(4), had used the words "the products of any other producer, processor, or manufacturer," and concluded that it must have intended to use the comparable terms in the proviso in the same sense (*id.*, at 598). In addition, the Court noted that an earlier version of the proviso, with broader language, had not been adopted by Congress (*id.*, at 600).

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narrow interpretation of the proviso, and have confirmed the Board's broader reading thereof. Thus, in *Servette,* the Supreme Court, noting that this Court had followed its decision in the instant case and the Board had followed its ruling in *Lohman, supra,* stated, "We agree with the Board" (377 U.S. at 55). In support of this conclusion, the Supreme Court, in the passage quoted earlier (p. 9), pointed out that the "proviso was the outgrowth of a profound Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded"; and that it "would fall far short of achieving this basic purpose if the proviso applied only in situations where the union's labor dispute is with the manufacturer or processor." It added (377 U.S. at 55, and *supra,* p. 9):

> There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress.

Finally, recognizing that this Court's restrictive reading of "producer" was prompted in part by the language of Section 8(b)(4)(B) (see n. 12, *supra*), the Supreme Court concluded that "producer" had to be given a broader reach for purposes of the proviso, or "else it is rendered virtually superfluous" (377 U.S. at 56).[13]

[13] The Supreme Court also attached no significance to the fact that another version of the proviso had broader language (see n. 12, *supra*), pointing out that: "This version was in a request

Subsequent to the Supreme Court's decision in *Servette,* this Court, in holding that the term "products of any employer" in Section 8(e) included "services furnished by an employer performing a distribution function," acknowledged that its earlier interpretation of the analogous terms in the proviso to Section 8(b)(4) had been too restrictive. *N.L.R.B.* v. *Joint Council of Teamsters,* 338 F. 2d 23, 26 (C.A. 9). The Court stated: "We recognized in *Great Western Broadcasting Corp.* v. *Labor Board,* 310 F. 2d 591, 595 (9th Cir. 1962), that the term 'product' may be construed to encompass services rendered, but thought (erroneously, as the Supreme Court held in *Servette*) that the context of § 8(b)(4) of the Act required a narrower reading" (*id.,* at 26, n. 3).

Although the primary employer in *Servette* was the distributor of a tangible product whereas here he renders an intangible service, the rationale of the Supreme Court's decision encompasses the latter situation no less than the former. The basic principle of the Court's holding is that Congress intended that the protection of the proviso not "be any narrower in coverage than the prohibition to which it is an exception." Where a means other than "publicity" is used, the prohibitory portion of Section 8(b)(4)(B) clearly reaches secondary activity in furtherance of a primary dispute with a radio station or other supplier of

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by the Senate conferees for instructions but was not made the subject of debate or vote because Senate and House conferees reached agreement on the proviso" (377 U.S. at 56, n. 15).

services,[14] no less than one in furtherance of a primary dispute with a distributor of a tangible product. Accordingly, it would follow that, where the means specified in the proviso are utilized, the proviso privileges the secondary activity irrespective of the function performed by the primary employer.[15]

Petitioner contends (Br. 9–11), however, that, to construe the proviso as applying to a situation where, as here, the primary employer supplies only an intangible service, would enlarge the exemption from the secondary boycott provisions to such an extent that it cannot reasonably be assumed that Congress intended to do so. Thus, petitioner argues, if the proviso is confined to situations where the primary employer processes or handles a tangible product, the union would only be able to "follow forward," from

[14] See, e.g., *N.L.R.B.* v. *Associated Musicians* (*Gotham Broadcasting Co.*), 226 F. 2d 900 (C.A. 2), cert. denied, 351 U.S. 962; *Teamsters, Local 901* ("*Editorial Imparcial*"), 134 NLRB 895, 901, 10(l) injunction sustained on appeal, *Local 901, Teamsters* v. *Compton*, 291 F. 2d 793 (C.A. 1); *Local Union 154, Int'l Typographical Union* (*Ypsilanti Press*), 135 NLRB 991, 996. See also *Hoffman* v. *Typographical Local 37*, 59 LRRM 2983 (D. Hawaii).

[15] Petitioner characterizes the Supreme Court's statement that the proviso should not be any narrower than the prohibitory part of Section 8(b)(4)(B) as "dictum" (Br. 14). We submit that a reading of the Court's opinion as a whole shows that, on the contrary, the statement is an integral part of the Court's analysis. Moreover, although the Court made the statement after pointing out that the activities of the Teamsters Union were a prime consideration in enacting Section 8(b)(4)(B) and the proviso, there is no warrant for assuming, as petitioner does, that the Court was, at most, only referring to the situations involving that union, which would usually entail following a tangible product.

the point of the dispute to the point where the products are being distributed. But, petitioner adds, if the proviso applies to situations where the primary employer is a newspaper or a broadcasting station, the union would be permitted to "go backwards" as well; i.e., it would be able to request consumers to boycott not only the "product" actually "produced" by the primary employer (newspapers, and radio and television programs), but also the "products" of the latter's advertisers. There is no merit to this contention.

First, there is no basis for petitioner's assumption (Br. 10) that, in a *Servette* situation, where the union's dispute is with a wholesaler of tangible products, the proviso permits the union to appeal for consumer support only at the retail stores handling the goods supplied by the wholesaler, and not also at the premises of the manufacturer who first processed the goods. If the union were to use a means other than "publicity" to exert consumer pressure against the neutral manufacturer, its action would be barred by the prohibitory part of Section 8(b)(4)(B); if the exemption of the proviso is to be coextensive with the prohibition, it would follow that "publicity" exerted against the manufacturer is exempt, no less than that exerted against neutrals at the other end, the retail stores. Indeed, one of the principal justifications for this Court's earlier decision—which confined the publicity proviso to a situation where the primary dispute was with a manufacturer or processor of a tangible product—was that it insured that the union could only move "forward" from the point of the dispute and

not "go backward" as well; but this consideration was rendered immaterial when the Supreme Court, in *Servette,* held that the proviso also applied to a situation where the primary dispute was with a wholesaler.

Second, to conclude that the proviso only applies where a tangible product is involved is to discriminate against various industries; that is, unions involved in disputes with processors and distributors of physical products would have an exemption from the secondary boycott provisions of the Act, when they appealed to consumers by means of "publicity, other than picketing," which unions involved in disputes with employers in service industries would not have. Since, as shown, the prohibitory part of Section 8(b)(4)(B) applies to persons who perform services as well as to processors and distributors of physical products, such a result would be contrary to the congressional objective of making the proviso coextensive with the prohibitory part of the section. Moreover, a distinction between tangible products and services could only be justified on the ground that the pressure on the neutral can be minimized in the former case but not in the latter. Thus, with a tangible product, consumers can be requested merely to boycott that product; but, where services are involved, the union has to call for a boycott of the entire business receiving that service.[16] However, the Supreme Court has ruled

[16] For example, if the union has a dispute with a manufacturer or distributor of "X" bread, it can request consumers, at retail stores handling it, not to buy that bread. On the other hand, if the union has a dispute with the company furnishing refrigeration service to the retail stores, it can only request consumers not to patronize the stores. Similarly here, where

that, while this consideration may be relevant insofar as picketing is concerned, it is irrelevant with respect to "publicity, other than picketing." As pointed out (*supra*, pp. 7–8), the Court, in *Fruit and Vegetable Packers*, held that, while Section 8(b)(4)(ii)(B) bars "picketing which persuades the customers of a secondary employer to stop all trading with him," the function of the proviso is "to authorize publicity other than picketing" even though it stopped "all trading with" the secondary employer.

In sum, in the light of the considerations set forth by the Supreme Court in *Servette* and *Fruit and Vegetable Packers, supra*, there is no warrant for denying the protection of the Section 8(b)(4) publicity proviso to service industries or in making that protection turn on whether the union is following the dispute "forward" or "backward."[17] The Board

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the dispute was with a television station advertising various products and services, the Unions could not confine their consumer appeal to the service performed by KXTV but had to call for a consumer boycott which was more widespread (see *supra*, pp. 11–12).

[17] Petitioner notes (Br. 13) that the Supreme Court, in *Servette*, buttressed its conclusion that the term "produced" in the proviso to Section 8(b)(4) covered a wholesaler of tangible products by reference to decisions under the Fair Labor Standards Act. While the meaning given to the terms used in that earlier and different statute does not necessarily reflect Congress' objective in enacting the 1959 proviso to the NLRA, it is significant that employees engaged in a wide variety of service operations have been held to be engaged in work necessary to the production of goods for commerce, within the meaning of Section 203(j) of the FLSA (29 U.S.C. § 203(j)). See, e.g., *Kirschbaum* v. *Walling*, 316 U.S. 517 (employees engaged in maintenance of loft buildings, the tenants of which were en-

therefore properly concluded that the proviso privileged the Unions' activity here.[18]

C. The "law of the case" doctrine is inapplicable

Finally, there is no substance to petitioner's contention (Br. 15–16) that the doctrine of "law of the case" precludes the Board, at this time, from contesting this Court's earlier ruling that the Unions' activity was not privileged by the proviso to Section 8(b)(4). It is well settled that a departure from that doctrine is justified where, as here, an intervening Supreme Court decision establishes that the intermediate appellate tribunal, in remanding the case at bar, has applied an erroneous rule of law. *Simmons Co.* v. *Grier Bros. Co.*, 258 U.S. 82, 91; *City of Seattle* v. *Puget Sound Power & Light Co.*, 15 F. 2d 794, 795

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gaged in the production of goods for commerce); *Bozant* v. *Bank of New York*, 156 F. 2d 787 (C.A. 2) (maintenance employees in bank building); *Union National Bank of Little Rock* v. *Durkin*, 207 F. 2d 848 (C.A. 8) (maintenance employees in bank building); *Goldstein* v. *Dabanian*, 291 F. 2d 208 (C.A. 3) (employees of check cashing service); *Public Bldg. Authority of Birmingham* v. *Goldberg*, 298 F. 2d 367 (C.A. 5) (maintenance employees employed by a private contractor managing a building housing federal employees engaged in processing social security claims from a multi-state area and in disbursing checks based on those claims); *Mitchell* v. *Dooley Bros., Inc.*, 286 F. 2d 40 (C.A. 1) (employees of independent contractor providing cleaning services to businesses engaged in commerce or in the production of goods for commerce).

[18] The decision in *Columbia Broadcasting System, Inc.* v. *Amana Refrigeration, Inc.*, 295 F. 2d 375 (C.A. 7), certiorari denied, 369 U.S. 812 (Pet. 15), is inapposite. That case, which was decided before the Supreme Court decision in *Servette*, *supra*, involved an interpretation of Sections 2(a) and 3 of the Clayton Act, provisions which did not have the same history as, and were intended to serve a different purpose than, the proviso to Section 8(b)(4) of the NLRA.

(C.A. 9); *Pacific American Fisheries* v. *Hoof,* 291 Fed. 306, 309 (C.A. 9); *Zdanok* v. *Glidden,* 327 F. 2d 944, 951 (C.A. 2) cert. den., 377 U.S. 934; *Lumminous Unit Co.* v. *Freeman Sweet Co.,* 3 F. 2d 577, 580 (C.A. 7); *Maryland Casualty Co.* v. *City of South Norfolk, et al.,* 54 F. 2d 1032, 1039 (C.A. 4); *Commissioner of Internal Revenue* v. *Netcher,* 143 F. 2d 484, 486 (C.A. 7); *White* v. *Higgins,* 116 F. 2d 312, 317 (C.A. 1); *Higgins, et al.* v. *California Prune & Apricot Growers, Inc.,* 3 F. 2d 896, 898 (C.A. 2); Note, *Law of the Case,* 5 Stanford L. Rev. 751, 765; 1B Moore, *Federal Practice* (2d ed. 1965) Sec. 0.404[10] at p. 575. Moreover, since a Board remedial order would have *in futuro* effect and it is also well settled that an injunction may be modified in the light of subsequent changes in the law,[19] application of the law of the case doctrine would only result in a futile act; i.e., it would compel the issuance of a cease and desist order which would then be subject to vacation because of the Supreme Court decisions in *Servette* and *Fruit and Vegetable Packers, supra.*

[19] See *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 18 How. (59 U.S.) 421, 431–432; *System Federation No. 91* v. *Wright,* 364 U.S. 642.

CONCLUSION

For the reasons stated, it is respectfully submitted that the supplemental petition to review should be denied.

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SEPTEMBER 1965.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*) are as follows:

> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: * * *
>
> *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by

another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

APPENDIX B

UNITED STATES OF AMERICA, BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 20–CC–234

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, SAN FRANCISCO LOCAL; NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, LOCAL 55

and

GREAT WESTERN BROADCASTING CORPORATION d/b/a KXTV

SUPPLEMENTAL DECISION

On December 27, 1961, the Board issued a Decision and Order in the instant case[1] finding that the Respondent Unions had not violated Section 8(b)(4)(ii)(B) of the Act as alleged. The Board held, in substance, that Respondents' conduct was protected by the so-called "publicity proviso" to that section.

Thereafter, the Charging Party filed a petition to review the Board's Order. On November 9, 1962, the Court of Appeals for the Ninth Circuit reversed the Board,[2] holding that the television advertising services of the primary employer, television station KXTV, were not "a product or products" within the meaning of that term in the proviso to Section 8(b)(4). The Court remanded the case to the Board for

[1] 134 NLRB 1617.

[2] *Great Western Broadcasting Corporation* v. *N.L.R.B., et al.*, 310 F. 2d 591 (C.A. 9).

consideration of two issues which were not reached by the Board in its original decision.[3]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The first issue set forth in the remand is:

Whether the conduct engaged in by the Respondents constituted threats, coercion or restraint within the meaning of Section 8(b)(4)(ii)(B) of the Act.[4]

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[3] On February 8, 1963, the Charging Parties' motion to remand for the taking of additional evidence was denied by the Board and the American Civil Liberties Union was granted leave to file an amicus curiae brief.

[4] Section 8(b)(4)(ii)(B) provides, in pertinent part, as follows:

"It shall be an unfair labor practice for a labor organization or its agents—

"(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where * * * an object thereof is:

* * * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person—

* * * * *

"Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;"

* * * * *

In setting forth the conduct which it wished the Board to evaluate, the Court pointed out that Respondents:

(1) had committees of the unions call upon all advertisers who used KXTV for the purpose of requesting them to discontinue their patronage of the station and assist the unions in their cause against KXTV;

(2) had a committee call upon Capitol Studebaker Company for the same purpose, in the course of which this advertiser was told that if it continued to advertise on KXTV the Labor Council would undoubtedly print the name of Capitol in the Labor Bulletin as not supporting the strike;

(3) mailed to all KXTV advertisers a letter setting forth the background of the strike and requesting discontinuance of advertising over the station, warning that failure to do so would bring an adverse economic reaction;

(4) printed and distributed four thousand handbills listing KXTV as "unfair," and naming Geer Chevrolet Company, Rainbo Baking Company, Shell Oil Company and Burgermeister Brewing Corporation as advertisers who nevertheless continued to utilize the services of the station, such distribution being made in front of KXTV, at the Sacramento Labor Temple, and at various Sacramento grocery stores which handled Rainbo bread and Burgermeister beer;[5]

(5) sent a letter to the San Francisco Labor Council asking the Council to return its Shell credit

[5] Copies of this leaflet were also found stuffed between loaves of bread at a supermarket supplied by Rainbo. The leaflet carried this note:

"This statement is directed to customers of the above advertisers. It is not a request to employees to refuse to pick up, deliver or transport, or to refuse to perform any service."

card to that company and to request the members of affiliated unions to do likewise;

(6) sent a later letter to the San Francisco Labor Council listing 14 companies who were then advertising on station KXTV, with the observation that "any aid" the Council and its affiliated members "can give in this sponsor area" would be appreciated;

(7) showed to the President of Handy-Andy, with an appeal to stop advertising on KXTV, a copy of the newly-printed leaflet which gave the background of the labor dispute with KXTV, named Handy-Andy as a company which continued to do business with KXTV, and added the comment: "We think you will agree that this continued association is contrary to the best interests of working people and the public";

(8) telephoned the general manger of Geer and, in conjunction with an appeal to have Geer cease advertising on KXTV, informed him that a new leaflet was bing printed naming Geer as a sponsor still advertising on KXTV and that if Geer continued to do business with the station, this leaflet would be passed out in front of Geer's establishment, among other places.

The Board has reviewed the eight items of conduct enumerated in the Court of Appeals remand. We find that Item 1, a mere request to neutral employers unaccompanied by any coercive acts, did not involve prohibited activity within the meaning of Section 8(b)(4)(ii)(B).[6] However, with respect to the other seven items, we find that the acts were part of a campaign calculated to bring economic pressure upon the producers and distributors of products advertised on KXTV for the purpose of forcing the producers to cease advertising on KXTV. The acts complained of

[6] See *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 46, 50–54.

may be characterized as threats to distribute, and the actual distribution of, leaflets and letters [7] announcing that the named companies were continuing to advertise on KXTV, and appealing to consumers to support Respondent in its dispute with KXTV. The Respondent made no attempt to limit consumer response to a boycott of only the particular product or products advertised, and it is plain from a reading of the leaflets and letters, and from the threats made to advertisers that Respondent's object was the institution of a total boycott of all products produced by companies advertising on KXTV. With respect to Handy Andy, Geer Chevrolet, and Capital Studebaker, and Shell Oil Company, Respondent sought a total boycott of their retail establishments. With respect to Rainbo Baking Company, and Burgemeister Brewery, Respondent appealed to consumers to refrain from buying any of their products sold in retail establishments without regard to whether the particular product was advertised on KXTV.

Other than its dispute with KXTV, Respondent had no dispute with any producer or distributor of products advertised on KXTV, and the question presented is whether Respondent's activities described above, constitute restraint or coercion within the

[7] In making our findings with respect to item No. 5 (request to the San Francisco Labor Council to return Shell credit cards) we note, as stated in our original opinion, 134 NLRB 1617, 1618, that as a result of this request Shell received numerous letters enclosing Shell credit cards. We further note that as a result of item No. 6 (letter to the San Francisco Council observing that "any aid" from the Council would be appreciated) a synopsis of the Labor Council minutes of the meeting of January 6, 1961, was mailed to everyone on the mailing list, including member unions and individual members, in which it was requested that the recipients discontinue purchases of the products or use of the services of specified companies who were still advertising on KXTV.

meaning of Section 8(b)(4)(ii) of the Act. The Supreme Court has held that picketing appeals to customers of a large retailer, which were limited to requesting customers to refrain from purchasing the particular product of the primary employer with whom the Union had a primary dispute, did not constitute coercion as defined in this Section of the Act.[8] The Court drew a distinction in this regard between consumer picketing in support of a product boycott and consumer picketing which sought to enforce a total boycott of the neutral employer's premises:

> When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employers' purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer. (377 U.S. 58, at 72.)

In the present case, Respondents' activities were directed towards the institution of a consumer boycott of all products distributed by the companies it listed as advertising on KXTV. In these circumstances, it is clear that its appeals and related conduct were not limited to the product in dispute,

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[8] *N.L.R.B.* v. *Fruit and Vegetable Packers and Warehousemen, Local 760, et al.* (*Tree Fruits*), 377 U.S. 58.

whether that product be reviewed as the physical product advertised over the facilities of KXTV,[9] or as merely the advertising component added to the product by KXTV's efforts.[10] By failing to limit its activities to the product in dispute, Respondent exceeded the limited privilege to engage in product boycotts which the *Tree Fruits* decision recognized. Accordingly, apart from the consideration of the effect of the publicity proviso discussed hereafter, we find that such conduct clearly constitutes threats, restraint, or coercion within the meaning of Section 8(b)(4)(ii) of the Act.

Having found that the actions previously described are coercive, we now consider whether they were protected by the proviso to Section 8(b)(4), and conclude, as we did in our earlier decision, that they were so protected.

Since the remand by the Court of Appeals for the Ninth Circuit, the Supreme Court has considered the scope of the proviso in *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 46. In *Servette*[11] we had followed our earlier ruling in *Lohman Sales Co.*, 132 NLRB 901, that products "produced by an employer" included products distributed by a wholesaler with whom the primary dispute existed. The Court of Appeals for the Ninth Circuit, applying its decision in the instant case that the proviso only covered the manufacturer of a physical product, reversed the Board (310 F. 2d 659). The Supreme Court, in turn reversed the Ninth Circuit, and approved of the Board's interpretation pointing out that:

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[9] Compare the discussion, *infra*, as to the nature of the product produced by KXTV for purposes of applying the proviso to 8(b)(4).

[10] Respondent's activities were not and could not have been confined to a boycott of only the advertising component.

[11] 133 NLRB 1501.

> The proviso was the outgrowth of a profound Senate concern that the union's freedom to appeal to the public for support of their case be adequately safeguarded. * * * It would fall far short of achieving this basic purpose if the proviso applied only in situations where the union's labor dispute is with the manufacturer or processor. * * * There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception. * * * (377 U.S. 46, at 55).

While *Servette* and *Lohman* both involved wholesalers of a physical product, we are of the opinion that the Supreme Court's decision in *Servette* sustains our holding, enunciated in *Lohman,* that "producer," as used in the proviso encompasses anyone who enhances the economic value of the product ultimately sold or consumed, i.e., for the purposes of the proviso, no distinction is drawn between processors, distributors and those supplying services. Since the Court has stated that the protection of the proviso is not "any narrower in coverage than the prohibition to which it is an exception," and since the prohibition of Section 8(b)(4)(B) covers the performance of services as well as processing or distribution of physical products, it follows that the proviso likewise applies to the performance of services.

Accordingly, with all due respect to the Ninth Circuit's contrary view in this case,[12] we adhere to our original conclusion that KXTV, by the addition of its services (advertising) to the products involved here, is a "producer" within the meaning of the

[12] In a decision issued October 29, 1964, *N.L.R.B.* v. *Joint Council of Teamsters, No. 38, et al.*, — F. 2d — footnote 3, the Ninth Circuit has itself recognized that the Supreme Court's decision in *Servette* extends the proviso to encompass "services."

proviso. Thus, even though the handbilling and related conduct calling for a consumer boycott of secondary employers was coercive, it nevertheless was protected by the proviso to Section 8(b)(4) of the Act.[13]

Having concluded that the intervening decisions of the Supreme Court in *Servette* and *Tree Fruits* support our original holding, with all due respect to the Court of Appeals, we find it unnecessary to reach and pass upon the second question raised in its remand, namely, whether or not the actions were protected by the free press and free speech provisions of the first Amendment to the Constitution. That issue would arise only if we found the actions were coercive and not protected by the proviso to that section of the Act.[14]

In summary, we have found that, with but one exception, Respondents' conduct did constitute threats, restraint or coercion within the meaning of Section 8(b)(4)(ii)(B) of the Act, but that it is not violative

[13] Our conclusion is buttressed by the Supreme Court's observation in *Tree Fruits* that by the proviso, Congress authorized: "* * * publicity other than picketing which persuades the customers of a secondary employer to stop all trading with him, but not such publicity which has the effect of cutting off his deliveries or inducing his employees to cease work." (377 U.S. 58, at 70–71.)

[14] The Board has consistently taken the position that as an administrative agency created by Congress it will presume the constitutionality of the Act it is charged with administering, absent binding court decisions to the contrary, *Milk Drivers and Dairy Employees, Local 537 (Sealtest Foods)*, 147 NLRB No. 35; *Chauffeurs, Teamsters, and Helpers General Local Union No. 20 (Milwaukee Cheese Co.)*, 144 NLRB 826; *Truck Drivers Local 413 (Patton Warehouse)*, 140 NLRB 1474. Moreover, the Supreme Court in *Tree Fruits* demonstrated the propriety of avoiding the constitutional problem in this difficult area, if possible. Our interpretation of the proviso does so.

of the Act because of the protection afforded by the publicity proviso. We accordingly reaffirm our original dismissal of the complaint.

Dated, Washington, D.C.

FRANK W. MCCULLOCH, *Chairman,*
BOYD LEEDOM, *Member,*
JOHN H. FANNING, *Member,*
(SEAL) *National Labor Relations Board.*

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